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DISPOSITION OF LAST REMAINS – A CASE DISCUSSION

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Parents can experience no more devastating tragedy than the death of a child. Actual experience proves that when such a death occurs along the path to a divorce, it is salt in the wound, and disposition of last remains can become yet another unfortunate area for further litigation between the divorcing parties. The existence of a separation or pending dissolution also can precipitate such a dispute between the spouses' respective family members when one spouse dies amid the disintegration of the marriage.

In view of the scant pertinent case law, this article reviews the actual experience of litigating disposition of last remains pursuant to C.R.S. §15-19-101, *et seq.* While disputes over disposition of a loved one's last remains rarely persist through family negotiations and into court proceedings, courts generally appear to understand – if the very few cases are any guide – that prompt and decisive judicial action is required, however regrettable and unpleasant the task of adjudicating such issues might be.

LEGAL FOUNDATIONS

C.R.S. §15-19-101, *et seq.*, was enacted effective August 6, 2003. The article principally prescribes the form and effect of a decedent's "declaration" as to disposition of last remains, as well as a protocol for disposition of last remains in the absence of the decedent having executed a proper declaration. To date, there have been no reported appellate opinions on Article 19.

Prior to the enactment of Article 19, the law prescribed that disputes over disposition of last remains were to be resolved based upon equitable principles, applying neutral principles of law. Certain specific considerations were to be taken into account, including the expressed desires of the decedent and the wishes of the surviving spouse and next of kin. *Wolf v. Rose Hill Cemetery Association*, 914 P.2d 468, 470-471 (Colo. App. 1995) (*cert. den.* March 25, 1996).

In one unreported case, which arose prior to the effective date of Article 19, the Court of Appeals upheld a trial court's determination, based on preponderance of the evidence about the expressed desires of the decedent and the wishes of his next of kin, to order cremation rather than burial of the decedent's remains. The decedent and surviving spouse were separated, so the respective families became litigants over disposition of the body. One party asserted C.R.S. §15-19-106, arguing that the nominee personal representative (decedent's brother) would have directed burial, but the court rejected the argument in view of the effective date of the statute.

THE CASE OF LANCE

Lance (names changed) died tragically in 2007, at age 18, in a snowboarding accident during a school trip to Colorado. Lance's parents, Alan and Melissa, were estranged at the time and even lived in different states. In accordance with Lance's express wishes a year before, when Lance was a minor, Melissa had moved him to live with her in North Carolina. Lance's father remained in the family's original home in California.

Upon Lance's death, Alan and Lance's brother, Jacob, petitioned the mountain-venue court for the right to control the disposition of Lance's last remains pursuant to C.R.S. §15-19-106(3). Noting that the parents disagreed as to the arrangements, Alan argued that the statute afforded priority to a majority of the surviving adult siblings of Lance or, in that case, only brother Jacob. Alan cited C.R.S. §15-19-106(1)(e) and (f), which state the following:

... The right to control disposition of the last remains or ceremonial arrangements of a decedent vests in and devolves upon the following persons, at the time of the decedent's death, in the following order: . . . (e) a majority of the surviving parents or legal guardians of the decedent, who shall act in writing;

(f) a majority of the surviving adult siblings of the decedent. . . .

Melissa argued two points in response: One, Melissa noted that, by mysterious coincidence, Lance wrote personally and vividly, only about two weeks before his death, about how he came to live with his mother in North Carolina, what his life there meant to him and what his plans were for his immediate future after graduation from high school. Lance's "statement of faith" was submitted as an exhibit, accompanied by an affidavit from Lance's teacher affirming the authenticity of the statement. Melissa contended that, in the exercise of liberal construction mandated by C.R.S. §15-19-102(2), the court could regard Lance's "statement" as a declaration of his intent and wishes that his remains be returned to his home in North Carolina, pursuant to C.R.S. §15-19-106(1)(a). That subsection vests highest priority for right to dispose of last remains in, "The decedent if acting through a declaration pursuant to §15-19-104. . . ." Melissa also cited C.R.S. §15-19-102(1)(a), which states:

A competent adult individual has the right and power to direct the disposition of his or her remains after death and should be protected from interested persons who may try to impose their wishes regarding such disposition contrary to the deceased's desires.

Two, Melissa fortunately had petitioned for and obtained appointment as administratrix of Lance's estate in North Carolina. She therefore argued, in the alternative, that as administratrix, she had priority and right to determine disposition of Lance's last remains pursuant to C.R.S. §15-19-106(1)(b)(I), which vests priority for right to control disposition in an appointed personal representative or special administrator. Only the decedent acting through a declaration has higher priority.

Lance's "statement of faith" admittedly did not comply strictly with the provisions of C.R.S. §15-19-104(1), which prescribes the components of a declaration of disposition of last remains.¹ C.R.S. §15-19-104(1) states, "The declarant may specify, any one or more of the following. . . ." Accordingly, Melissa submitted that Lance's statement did not have to comply with all of the section's provisions as a prerequisite for the court to draw reasonable inferences from the statement about Lance's intent or wishes with regard to disposition of his last remains. The statement movingly described Lance's turmoil and tribulation in his own spiritual journey and described the family dysfunction and distress he experienced when living in California. The statement revealed a young man who had found his spiritual and educational anchors, and developed a positive outlook for his future, at home with his mother in North Carolina.

Nevertheless, the court concluded after oral argument that the statement was unascertainable as to Lance's intent with regard to disposition of his last remains. Also, the court properly noted C.R.S. §15-19-104's requirement that a declaration "shall be signed and dated by the declarant and may be notarized and witnessed in writing by at least one adult who confirms that he or she was present when the declarant signed the declaration."²

Turning to Melissa's point two, the court relied upon C.R.S. §15-19-106(1)(b)(I) to find that Melissa, as the appointed personal representative or administrator of Lance's estate, had the right to control disposition of his last remains. Finding no evidence of any fraud or misrepresentation in Melissa's acquisition of her letters of appointment as administratrix, the court enforced her letters and ordered that Melissa had the right to control the disposition of Lance's last remains. Upon the court's order, Melissa arranged for the transportation of Lance's last remains to his home in North Carolina, where they were interred after a memorial service attended by more than 200 of Lance's friends and classmates.

REVIEW OF STATUTE'S APPLICATION

In the case of Lance, the relatively new disposition-of-last remains statute worked well and was applied directly and decisively in accordance with its plain terms by the court. The court reached its decision after a hearing that was emotionally wrenching and difficult for the court, its staff, the parties and the attorneys involved. That said, the court understood that prompt and decisive action was needed for the family members to reach resolution and closure. Although the parents, and Lance's brother, attempted to resolve the matter prior to hearing, it was not possible, and the court understood that judicial intervention was necessary.

One anomaly, if not ambiguity, in the priority statute (§15-19-106) emerges upon reflection. The last family decision makers would be “a majority of the surviving adult siblings of the decedent,” pursuant to §15-19-106(1)(f). If no such majority can be reached, should the trial court’s determination not turn upon its ruling, based on testimonial evidence at hearing, as to what can be inferred about the decedent’s wishes? Certainly the highest priority for right to control disposition of last remains properly belongs to, “The decedent if acting through a declaration pursuant to §15-19-104. . . .” Section 15-19-106(1)(a). Yet, the next party with highest priority after majority of adult siblings is, “Any person who is willing to assume legal and financial responsibility for the final disposition of the decedent’s last remains.” Section 15-19-106(1)(h).

It seems that such voluntary financial commitment from “any person,” while laudable, should not trump the trial court’s sound judgment and broad discretion to determine the wishes of the decedent based on the evidence presented at hearing. Such a procedure would comport with the article’s chief principle of construction: “A competent adult individual has the right and power to direct the disposition of his or her remains after death and should be protected from interested persons who may try to impose their wishes regarding such disposition contrary to the deceased’s desires.” Section 15-19-102(1)(a).

¹At C.R.S. §15-19-107, the article conveniently provides a “legally sufficient” form for such a declaration.

²While Lance’s statement was dated, it was not signed. C.R.S. §15-19-102(1)(c) states that the right to direct the disposition of one’s remains “must be stated in writing.”

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